

Review of the Standing Committees/Commissions
Discussion for the November 10, 2008 Board Meeting

Requested information from Counsel:

- Establishment dates for the Village's three Commissions: Building Facilities, Ethics, Personnel
- Reasons for the establishment of the Village's three Commissions: Building Facilities, Ethics, Personnel
- Are emails in lieu of public meetings required to be made public?

(Attachment A)

Requested information from staff:

- Sections of the Code where references are made to the Village's standing Committees and Commissions.

(Attachment B)

Areas for Discussion:

- Overview of the Building Facilities Commission and Historic Preservation Commission's Local Advisory Panel.
- Routine reporting from each Committee and Commission to the Board of Managers on its activities and operations.
- Setting a minimum number of members on each Committee and Commission.
- Rotation of standard membership (term limits).
- Member education.

Per S. Eig on 10/31/2008

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November 6, 2008

TO: Board of Managers, Chevy Chase Village

FROM: David R. Podolsky, Village Counsel

SUBJECT: Legal and Historical Background regarding Village Committees/Commissions
and application of Maryland Public Information Act

I. INTRODUCTION

Ms. Eig has requested that the Village Board of Managers review the structure and operation of various Village committees and commissions. As a predicate to such a review, Ms. Eig has requested information regarding the history of and certain legal aspects regarding Village committees and commissions. The following is our response to Ms. Eig's request.

II. WHEN WERE THE VILLAGE'S THREE STANDING COMMISSIONS ESTABLISHED?

The Village Ethics Commission was established in May, 1984. The Village Building Facilities Commission was established with the adoption of Chapter 7 of the Village Code in January, 1986. The Village Personnel Commission was established in October, 1990. Prior to October, 1990, the Village had a Personnel Committee since at least 1982.

III. WHAT WERE THE REASONS FOR THE ESTABLISHMENT OF THE VILLAGE'S THREE COMMISSIONS AND HOW DO COMMISSIONS DIFFER FROM COMMITTEES?

Under the current structure of the Village government, which is similar to many other governments, committees perform merely advisory functions and may make recommendations to the Board but do not have any independent adjudicatory authority. In contrast, Village commissions, although they may make recommendations to the Board, also have binding adjudicatory authority. The transition of the Village Personnel Committee to a Personnel Commission is illustrative of this distinction. Prior to 1990, a Village employee who felt aggrieved by a decision of the Village Manager could appeal that decision. The Personnel Committee was authorized to conduct hearings on an employee's complaint and issue a report and recommendation to the Board of Managers. The Board of Managers was authorized to make a decision based either on the record before the Personnel Committee or after a separate hearing conducted by the Board of Managers. In 1990, the Personnel Committee was converted to the Personnel Commission and was given the authority to make a binding decision on the

employee's grievance. The Commission was authorized to affirm, reverse or modify the action of the Village Manager. Of course, commissions also may make recommendations to the Board regarding matters within the scope of their responsibilities.

Under Section 2-5 of the Village Code, the Ethics Commission is granted the authority to formally interpret the Ethics Ordinance and to issue opinions concerning the application of the Ethics Ordinance. The Ethics Commission also is authorized to hear complaints alleging violations of the Ethics Ordinance, to render a determination as to the validity of a complaint, and to take enforcement action with respect to a violation.

As discussed above, under Section 3-4 of the Village Code, the Personnel Commission is authorized to hear appeals and to render decisions pursuant to Section 3-27 of the Personnel Code. Similarly, under Section 7-4 of the Village Code, the Building Facilities Commission is responsible for the administration and enforcement of the rules and regulations for the use of the Village Hall and "shall make all decisions relating to rental and public use of the Lambert Room, Humphrey Hall and the Tuohey Conference Room."

Committees, such as the Budget Committee, Committee on Children, Youth and Families, Environmental Committee, Parks Committee, etc. do not have independent adjudicatory decision-making authority. They may make recommendations to the Board of Managers and may be given some authority to administer policies of the Board, but may not make decisions that are binding on the Village.

IV. ARE E-MAILS, IN LIEU OF PUBLIC MEETINGS, PUBLIC DOCUMENTS, AND, IF SO, MUST THEY BE PUBLISHED?

A. Are e-mails public "documents"?

Under the Maryland Public Information Act (PIA), "all persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees." Md. Code Ann., State Govt. Art. § 10-612(a). The "public records" that must be produced in response to a request made pursuant to the PIA include "the original or any copy of any documentary material that ... is made by a unit or instrumentality of ... a political subdivision or received by the unit or instrumentality in connection with the transaction of public business..." Id. at § 10-611(g)(1)(i).

An e-mail message can be a public record. The Maryland Attorney General has opined that a "public record" includes a printed version of an e-mail as the paper will itself be a "public record," but even if the message was never printed, the version of the e-mail retained in the computer's storage would also be a "public record." 81 Opinions of the Attorney General 140, 144 (1996). The Attorney General's Opinion stated that "e-mail messages among members of [an agency] pertaining to [agency] business would be public records, albeit housed only in the home computers of the members. Each member would then be the 'custodian' of the e-mail

messages, because each member would have 'physical custody and control of a public record'." 81 Opinions of the Attorney General 140, 144-145 (1996).

Accordingly, e-mails sent or received by Board members concerning Village business are "public records" and would be subject to production under the PIA. Each member would be deemed the "custodian" of the emails stored in his or her personal computer for purposes of the PIA and would need to comply with the requirements of the PIA.

B. Are e-mails between members of commissions or committees (as distinguished from the Board of Managers) public documents?

The foregoing analysis would appear to apply to commissions and committees formally established pursuant to the Village Code or by action of the Board of Managers. As indicated above, under the PIA, the term "public record" includes "the original or any copy of any documentary material that ... is made by a *unit or instrumentality* of ... a political subdivision or received by the unit or instrumentality in connection with the transaction of public business...". Id. at § 10-611(g) (emphasis added). Whether the PIA would extend to a particular advisory committee's records would depend on whether the committee is a unit or instrumentality of the Village.

The PIA is construed liberally in favor of disclosure. See Caffrey v. Dep't of Liquor Control for Montgomery County, 370 Md. 272, 305 (2002) (quoting Kirwan v. The Diamondback, 352 Md. 74 (1998)) (explaining that the PIA's provisions must be "liberally construed" in order to effectuate the Act's "broad remedial purpose"). The Court of Appeals has stated that there is "no single test" for determining whether an entity is an agency or instrumentality of the government. Instead, "all aspects of the interrelationship" between an entity and the state or political subdivision must be examined, including the entity's public purpose, the degree of control exercised by the political subdivision, the entity's source of funding, and the ability of the political subdivision to appoint or remove the entity's members. See City of Baltimore Development Corp. v. Carmel Realty Associates, 910 A.2d 406 (2006) (finding that the City of Baltimore Development Corporation's status as an "agent or tool of Baltimore City...to accomplish the City's ends or purposes" rendered it an "instrumentality" of the city); A.S. Abell Publishing Company v. Mezzanote, 297 Md. 26, 35, 39 (1983) (finding that the Maryland Insurance Guaranty Association is an instrumentality of the State within the scope of the PIA given its statutory creation, public purpose, lack of authority to independently manage its affairs or enforce its regulations, and the ability of a commissioner to reverse its decisions).

In April 2001, the Maryland Attorney General opined that a proposed citizen police review and advisory board in the City of Frederick, whose members would be appointed and confirmed by the city's Mayor and Board of Aldermen and would be authorized to make recommendations for action to the Board, constituted an "instrumentality" of the local government for purposes of the PIA. See 86 Opinions of the Attorney General 94 (2001). Specifically, the Attorney General's office pointed to the board's creation pursuant to a City ordinance, its performance of a public function related to oversight of the City police department,

and the City's control of the board's budget and staff. The Attorney General's office made this determination even though the proposed board would be comprised entirely of private citizens. See id.

Although the application of the PIA would depend on the specific facts relating to the creation and operation of the subject Village advisory committee, based on the foregoing, it appears that correspondence between members of an advisory committee created to serve a public purpose and to make recommendations to the Board of Managers would likely be subject to the PIA. This would be the case notwithstanding the fact that the composition of the advisory committee might consist of all private citizens.

C. Must e-mails that are "public records" be published?

Although the communications described above are public records and must be produced upon request in accordance with the provisions of the PIA, the PIA does not impose an affirmative duty to post all communications on a government's website. Also, there are several exceptions to the obligation to disclose public records. Generally the exceptions fall into one of two categories: those records that a custodian is prohibited from disclosing; and those records as to which a custodian has discretion to deny disclosure. Records which are not disclosable include, but are not limited to, certain personnel records, letters of reference, and retirement records. Records for which a custodian may (but is not required to) refuse disclosure include, but are not limited to, certain inter- and intra-agency memoranda, certain testing data, research projects, real estate appraisals obtained in anticipation of acquisition of property, and investigatory records. It should be noted that certain information in otherwise disclosable records may not be disclosed. Such information includes, but is not limited to, medical data, trade secrets, and home addresses and phone numbers of public employees.

We hope the foregoing adequately answers Ms. Eig's questions. We suggest that commission and committee members participate in a "tutorial" when they are appointed to help them understand their roles and the various laws that may affect their activities (e.g., Open Meetings Act, Public Records Act, the Village Ethics Ordinance, etc.)

As always, if you have any questions or we can be of further service, please let us know.

**Sections of the Code where references are made
to the Village's standing Committees and Commissions**

Ethics Commission

Section 2-5, Administration by Ethics Commission

(a) There shall be a Village Ethics Commission which shall consist of three (3) members appointed for three-year staggered terms by the Chairman of the Board of Managers, with the concurrence of the Board of Managers. The commission shall be assisted in carrying out its responsibilities by the Village counsel.

(b) The Commission shall be the advisory body responsible for interpreting this chapter and advising persons subject to it as to its application.

(c) The commission shall be responsible for hearing and deciding on advice of the Village counsel (or other Legal Counsel if appropriate), any complaint filed regarding an alleged violation of this chapter by any person.

(d) The commission or an office designated by the commission shall be the custodian of all forms submitted by any person in accordance with this chapter.

(e) Any official or other person subject to the provisions of this chapter may request the commission for an advisory opinion concerning the application of this chapter. The commission shall respond promptly to these requests, providing interpretations of this chapter based on the facts provided or reasonably available to it. Copies of these interpretations, with the identity of the subject deleted, shall be made available to the public in accordance with any applicable state or Village law regarding public records.

(f) Any person may file with the commission a complaint alleging a violation of any of the provisions of this chapter. These complaints shall be written and under oath, and may be referred to the Village counsel or other Legal Counsel, if appropriate, for investigation and review. If after receiving an investigative report, the commission determines that there are insufficient facts upon which to base a determination of a violation, it may dismiss the complaint. If there is a reasonable basis for believing a violation has occurred, then the subject of the complaint shall be afforded an opportunity for a hearing conducted in accordance with the Village's applicable rules of procedure for actions taken on the record. Any final determination resulting from the hearing shall include findings of fact and conclusions of law. Upon a finding of a violation, the commission may take any enforcement action provided for in accordance with section 2-9 of this chapter. After a complaint is filed and until a final determination by the commission, all actions regarding a complaint shall be treated confidentially.

Personnel Commission

Section 3-4, Personnel Commission

(a) There shall be a three-member personnel commission. The members shall serve for three-year terms or until a successor has been appointed, except that the initial appointments shall be for one (1) year, two (2) years and three (3) years, so that the members terms shall be staggered. Each year the chairman of the Board of Managers shall designate one (1) commission member as chairman of the commission. Membership on the commission shall be restricted to qualified voters of Chevy Chase Village who are not Village employees and who are not elected officials of the Village.

(b) The members of the personnel commission shall familiarize themselves with the Village personnel code and regulations and procedures adopted pursuant thereto.

(c) The personnel commission shall, from time to time, make recommendations to the Village Manager or Board of Managers to promote the efficiency and effectiveness of the Village civil service.

(d) The personnel commission shall hear appeals pursuant to section 3-27 of this chapter.

Building Facilities Commission

Section 7-4, Building Facilities Commission

(a) There shall be a Village Building Facilities Commission which shall consist of five (5) members appointed for five-year staggered terms by the Chairman of the Board of Managers with the concurrence of the Board. At least one member of the Commission shall reside within sight and sound of the Village Hall.

The Commission shall be assisted in carrying out its responsibilities by the Village Counsel. The Village Manager shall serve as the designee of the Commission to perform such functions as may be assigned by the Commission.

(b) The Commission shall formulate, and submit to the Board of Managers for its approval, proposed rules and regulations concerning public use of the Lambert Room, Humphrey Hall and the Tuohey Conference Room. These shall include, but not necessarily be limited to, standards and eligibility for use, hours of use, rental fees, conduct during use, permits for use, damage to equipment, building or property during use, and such related matters as may, in the judgment of the Commission, enhance the utility and enjoyment of the Lambert Room, Humphrey Hall and the Tuohey Conference Room and are consistent with the policy of this Chapter.

(c) The Commission shall be responsible for the administration and enforcement of the rules and regulations approved by the Board of Managers, and shall make all decisions relating

to rental and public use of the Lambert Room, Humphrey Hall and the Tuohey Conference Room, subject to subsections (d) and (e) of this section.

(d) Any person or entity that feels aggrieved by a decision of the Commission relating to rental or use of the Lambert Room, Humphrey Hall and the Tuohey Conference Room may appeal that decision to the Board of Managers, which shall conduct a hearing and render a decision.

(e) In scheduling public use of the Lambert Room, Humphrey Hall and the Tuohey Conference Room the Commission shall make reasonable efforts to avoid conflicts with meetings of the Board of Managers, the Village staff, departments or advisory committees. In the event of a conflict, Village governmental units and Committees shall have priority.

(f) The Commission may make recommendations to the Board of Managers to improve the appearance and/or utility of the Village Hall, including recommendations concerning furnishings and equipment used therein and decoration thereof. Such recommendation, if submitted to the Board, shall be accompanied by a budget setting forth the probable costs of the suggested improvements.

Tree Committee

Section 17-5, Appeals procedures

(a) Upon the filing of an appeal, the Village Manager shall forthwith transmit to the Board of Managers the record pertaining to the appeal. The Village Manager shall give written notice to the hearing on appeal to the applicant, all abutting property owners and all members of the Village tree committee. Said notice shall be provided to such persons at least ten (10) days prior to the meeting at which the appeal is to be considered. In addition, the property shall be posted with a sign which shall include the case number, nature of the application, and the date, time and place of the hearing. The sign shall be located so as to be readable from the roadway abutting the property and should be placed five (5) feet from the sidewalk, if one exists, or five (5) feet from the curb or the edge of the paved portion of the street if there is not curb. In the case of lots abutting more than one (1) street, a sign shall be posted for each abutting street.